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Foong Yok Kok v Prudential Assurance Malaysia Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(NCvC)(W)-210–02 OF 2018
ABDUL RAHMAN SEBLI, KAMARDIN HASHIM AND MOHAMAD ZABIDIN JJCA
31 JANUARY 2020

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Civil Procedure — Appeal — Leave to appeal — Plaintiff sued defendant for unpaid commissions but did not specify quantum of his claim — Plaintiff prayed for declaration that defendant's stoppage of payment of commissions was illegal and null and void and for damages to be assessed — Trial court dismissed plaintiff's claim and allowed defendant's RM234,940 counterclaim — Whether plaintiff's failure to obtain leave of Court of Appeal to appeal against trial court's decision fatal — Whether appeal was incompetent under s 68(1)(a) of the Courts of Judicature Act 1964 — Whether plaintiff's prayer for 'damages to be assessed' could not be factored into the value of his claim because damages were consequential and not the 'subject-matter of the claim'

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The appellant sued the respondent for certain unpaid overriding commissions. In turn, the respondent counterclaimed for the return of RM234,940.28 that it claimed it had paid the appellant by mistake. In his statement of claim, the appellant did not quantify his claim but merely claimed for commissions calculated from September 2013 until the date of judgment. The High Court dismissed the appellant's claim and allowed the counterclaim. In the appellant's instant appeal against the whole of the High Court's decision, the respondent raised the preliminary objection that the appeal was incompetent under s 68(1)(a) of the Courts of Judicature Act 1964 ('the CJA') as the appellant had not obtained leave of the Court of Appeal ('the COA') to file the appeal. Section 68(1)(a) of the CJA stated that if the amount or value of the subject-matter of the claim was less than RM250,000, no appeal shall be brought to the COA except with leave of the court. In the instant appeal, the appellant had not specified the quantum of his claim and the only other quantum that was in dispute was the counterclaim of RM234,940.28 that was awarded to the respondent. The appellant argued, inter alia, that his claim included prayers for a declaration that the respondent's stoppage of payments of overriding commissions to him was illegal and null and void and for damages to be assessed.

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Held, unanimously dismissing the appeal without considering the merits:

(1) The appellant's failure to obtain leave of the COA to appeal was fatal. Hence, the appeal was incompetent it was dismissed with costs without considering the merits (see para 39).

(2) Allowing the appellant's appeal to proceed on its merits would have caused substantial miscarriage of justice as it would have blatantly disregarded s 68(1)(a) of the CJA and prejudiced the respondent (see para 34).

(3) The appellant's pleadings never quantified the amount of damages he was seeking. His prayer for 'damages to be assessed' could not be factored into the value of his claim because damages were consequential and not the 'subject-matter of the claim' (see paras 35–36).

[Bahasa Malaysia summary

Perayu telah menyaman responden kerana komisyen tertentu yang banyak tidak dibayar. Seterusnya, responden telah menuntut balas bagi pemulangan RM234,940.28 yang didakwanya telah tersilap dibayar kepada perayu. Dalam penyataan tuntutannya, perayu tidak menyatakan tuntutannya tetapi hanya menuntut untuk koisyen yang dikira dari September 2013 sehingga tarikh penghakiman. Mahkamah Tinggi telah menolak tuntutan perayu dan membenarkn tuntutan balas. Dalam rayuan perayu ini terhadap keseluruhan keputusan Mahkamah Tinggi, responden telah menimbulkan bantahan awal bahawa rayuan itu tidak kompeten d bawah s 68(1)(a) Akta Mahkamah Kehakiman 1964 ('AMK') kerana perayu tidak memperoleh kebenaran Mahkamah Rayuan ('MR') untuk memfailkan rayuan itu. Seksyen 68(1)(a) AMK menyatakan bahawa jika jumlah atau nilai hal perkara tuntutan kurang daripada RM250,000, tiada rayuan patut dikemukakan kecuali dengan kebenaran mahkamah. Dalam rayuan ini, perayu tidak menyatakan jumlah tuntutannya dan satu-satunya kuantum lain yang dipertikaikan adalah tuntutan balas RM234,940.28 yang telah diawardkan kepada responden. Perayu berhujah, antara lain, bahawa tuntutannya termasuk permohonan untuk deklarasi bahawa pemberhentian bayaran responden untuk komisyen yang banyak kepadanya adalah salah, terbatal dan tidak sah dan agar ganti rugi ditaksir.

Diputuskan, sebulat suara menolak rayuan tanpa mempertimbangkan merit:

(1) Kegagalan perayu memperoleh kebenaran MR untuk merayu adalah memudaratkan. Justeru, rayuan itu tidak kompeten dan ia ditolak tanpa kos tanpa mempertimbangkan merit (lihat perenggan 39).

(2) Dengan membenarkan rayuan perayu untuk meneruskan atas meritnya akan menyebabkan keadilan tidak dapat dilaksanakan secara substantial kerana ia secara terang-terangan akan mengabaikan s 68(1)(a) AMK dan memprejudikan responden (lihat perenggan 34).

A (3) Pliding perayu tidak pernah mengukur jumlah ganti rugi yang dipohonnya. Permohonannya untuk 'damages to be assessed' tidak dapat diambil kira dalam nilai tuntutannya kerana ganti rugi adalah akibat dan bukan 'subject-matter of the claim' (lihat perenggan 35–36).]

B **Cases referred to**

Amer Mohideen Dawood v Sneh Bhar w/o Ter Binder Singh [1996] 2 MLJ 329, CA (refd)

Harcharan Singh s/o Sohan Singh v Ranjit Kaur d/o S Gean Singh (sued as the administratrix of the estate of Bhagwan Singh s/o Sohan Singh, deceased) C [2010] 2 MLJ 479, CA (refd)

Lam Kong Co Ltd v Thong Guan Co Pte Ltd [2000] 1 MLJ 129, CA (refd)

Legislation referred to

D Contract Act 1950 s 73
Courts of Judicature Act 1964 s 68(1)(a)
Rules of Court 2012 O 33 r 2
Rules of the Court of Appeal 1994 rr 3A, 48, 102
Sarawak Limitation Ordinance (Cap 49) Schedule, Item 77

E **Appeal from:** Civil Suit No NYY-22NCvC-20/12 of 2016 (High Court, Miri)

David Siaw Ting Chang (David Siaw & Co Advocates) for the appellant.
Adrian L Chew (Chan Yin Xi with him) (Battenberg & Talma) for the respondent.

F **Kamardin Hashim JCA (delivering judgment of the court):**

INTRODUCTION

G **[1]** This is an appeal by the appellant/plaintiff against the decision of the High Court judge ('trial judge') given on 18 December 2017 after a full trial, in dismissing the appellant/plaintiff's claim and in allowing the respondent/defendant counterclaim in the sum of RM234,940.28 with a global cost of RM15,000.

H **[2]** The appellant/plaintiff was one of the pioneers and was responsible for the setting up of the Miri branch of the respondent/defendant's company. He was promoted to the position as the agency manager. He hold the post until he retired in the respondent/defendant's company.

I **[3]** The appellant/plaintiff's claim was for the overriding commissions in respect of Liew Sze Chin's and Mesir Ting's units calculated from September 2013 until the date of judgment.

[4] The respondent/defendant counterclaimed for the refund of the sum of RM234,940.28 which was paid to the appellant/plaintiff under the mistaken belief that appellant/plaintiff was entitled to it as overriding commissions. A

[5] We heard the appeal on 25 June 2019. After considering the submissions of parties on the issues raised in during the preliminary objection by the respondent/defendant, we unanimously dismissed the appeal with costs. We now give our reasons in dismissing the appeal. B

[6] For ease of reference, the parties will be referred to as they were in the High Court. C

THE BACKGROUND FACTS

[7] Facts of the case was not much in dispute. During the plaintiff's tenure as the agency manager in the defendant's company, he had recruited an insurance agent named Voon Pin Kuan ('Voon'). D

[8] When Voon was promoted as Unit Manager and later agency manager, he in turn recruited his wife, Liew Sze Chin ('Liew') to be his agent. Another agent, Mesir Ting was later recruited by Liew under her direct control and supervision. E

[9] Generally, an agency leader such as Voon, was entitled to earn overriding commission on his 'downline' agent namely Liew and also Liew's own 'downline' agent, Mesir Ting. F

[10] However, pursuant to cl C1 of Schedule C of the agency manager agreement, Voon could not override on Liew's production as they were spouse. In other words, Liew's production could not be taken into account in Voon's total production as the agency manager. G

[11] Due to the above, the plaintiff being the 'mother manager' was entitled to override Voon's overriding commission in respect of Liew and Mesir Ting's units. This is pursuant to cl C2 of Schedule C of the agency manager agreement. H

[12] The plaintiff's entitlement of the overriding commission was subsequently reduced substantially from September 2013 onwards as the defendant had stopped crediting the overriding commissions from Liew's and Mesir Ting's units into the plaintiff's account. I

[13] As such, sometimes in December 2013, the plaintiff wrote to the defendant to enquire as to the reason for not crediting the said commission into his account. However, the defendant did not reply to the said letter.

[14] Sometimes in February 2014, the plaintiff also discovered that his retirement gratuity benefit ('RGB') for year 2014 amounting to RM211,202.96 was withheld by the defendant.

[15] Resulting therefrom, the plaintiff had through his advocates Messrs Suhaili & Bong Advocates wrote a few letters dated 10 June 2014, 14 July 2014 and 23 February 2015 to enquire the reason as to why the defendant did not credit the overriding commission for Liew and Mesir Ting's units into the plaintiff's account and the withholding of the plaintiff's RGB.

[16] It was only on 7 May 2015 that the defendant's advocates, Messrs Shearn Delamore & Co replied the plaintiff's above said letters. In their letter dated 7 May 2015, the defendant stated that the plaintiff was never entitled to any overriding commission with respect to Liew's and Mesir Ting's units under the agency manager agreement and that the defendant had previously made payments of overriding commission to the plaintiff by mistake.

[17] It was also stated in the said letter dated 7 May 2015 that the defendant was entitled to withhold the plaintiff's RGB under cl 16 of the agency manager agreement to utilise the same to repay the mistaken payments of the overriding commission.

[18] However, the RGB was finally released by the defendant to the plaintiff during the trial before the trial judge on 30 June 2017. This RGB issue was no longer a live issue.

[19] The plaintiff's position was that the defendant was not entitled to stop the payments under the terms of the agency manager agreement merely because of the alleged divorce between Voon and Liew.

[20] The plaintiff further argued that he is not obliged to return the overriding commissions in the sum of RM234,940.28 which was paid voluntarily and consciously by the defendant. The defendant was thus estopped from claiming such payments from the plaintiff. The plaintiff alleged that the defendant's counterclaim were all over the three years period and thus barred by limitation.

[21] The defendant on the other hand argued that the plaintiff was not entitled to claim for the overriding commissions of business canvassed by Liew

and Mesir Ting because the marriage between Voon and Liew had been dissolved. The defendant was not aware of the marital status of Voon and Liew prior to September 2013 and that the payments were made under mistake of fact.

AT THE HIGH COURT

[22] The learned trial judge dismissed the plaintiffs' claims and allowed the defendants' counterclaims. Learned trial judge referred to cl 9 of the Guidelines on Promotion and Maintenance of Contract Info Bulletin No AG770 dated 1 April 2009 ('2009 Info Bulletin') as the basis for the payment of the overriding commission where it was stated:

> If a Unit Manager or Agency Manager recommends his spouse for appointment to UM 1 or UM 2 and the recommendation is approved by the Company, then he will be entitled to override on his spouse. Instead his mother manager will override on the spouse at the same rate the mother manager overrides on him. The group production count will also be credited to the mother manager.
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> If and when such spouse is promote to the position of agency manager, the Promotion Incentive will not be payable.

[23] The learned trial judge also relied on Schedule C (Appointment of Spouse as Unit Manager or Agency Manager) of the agency manager agreement dated 15 December 2010 ('2010 agency agreement'), in particular, cll C1 and C2 which provide as follows:

> C.1 In the event of the spouse of the Agency Manager being himself/herself appointed a unit manager or an agency manager from the Agency Manager's Unit, the Agency Manager shall not override on such spouse who has been appointed and the spouse's production shall not be taken into consideration in the Agency Manager's total production.
>
> C.2 The mother manager of the Agency Manager shall override on the spouse who has been appointed a unit manager or an agency manager and the overriding rate will be the same rate at which the mother manager overrides on the Agency Manager. The Group Production Count will also be credited to the mother manager.

[24] From the above provisions, learned trial judge held that Voon would not be entitled to override on his spouse's (Liew) overriding commission. The plaintiff being the mother manager for both Voon and Liew would be entitled to the said overriding commission instead. However, due to the dissolution of Voon and Liew's marriage on the 3 February 2009, the plaintiff is no longer entitled to the said overriding commissions.

[25] The learned trial judge accepted the fact that Voon and Liew were already divorced only came to the defendant's knowledge in late May 2013.

The learned trial judge also accepted the defendant's explanations and held that it was an honest mistake on the part of the defendant in paying the overriding commissions to the plaintiff even after the dissolution of Voon and Liew's marriage.

[26] Relying on s 73 of the Contract Act 1950 and decided cases, the learned trial judge held that the defendant was entitled to recover back the overriding commissions paid to the plaintiff by mistake. The plaintiff was obliged to return the said wrongful payments as it is against the rule of natural justice and conscience to keep it. Otherwise, the plaintiff would be unjustly enriched at the expense of the defendant. In this case the defendant did not benefited by this process of recovery as the right person who is entitled to the overriding commissions was Voon after his divorce with Liew.

[27] Lastly, the learned trial judge held that by virtue of Item 77 of the Schedule of the Limitation Ordinance of Sarawak (Cap 49), since the defendant becomes known the mistake of the payments to the plaintiff sometimes in May 2013, the defendant's counter claim which was filed on 30 March 2016 was still well within the three years limitation period as provided under Item 77 of the said Ordinance.

PRELIMINARY OBJECTION

[28] Before us, learned counsel for the defendant raised a preliminary objection ('PO') that the plaintiff's appeal was incompetent. Learned counsel brings this PO under s 68(1)(a) of the Courts of Judicature Act 1964 ('the CJA 1964') on the sole ground that the value of the subject matter of the claim was only RM234,940.28 which is below the statutory trigger of RM250,000 and no prior leave of appeal was ever applied to and granted by this court.

[29] In opposing the PO, learned counsel posited the following six issues:

(a) learned counsel for the defendant only gave just five days notice to raise this PO. It was given at a very late stage of the appeal. The issue of non-compliance to s 68(1)(a) of the CJA 1964 was never brought up during the case management;

(b) the proper procedure to challenge the non-compliance issue should be by way of motion under r 48 of the Rules of the Court of Appeal 1994 ('the RCA 1994');

(c) the PO on the ground of non-compliance shall not be allowed and it does not render the proceedings void base on rr 3A and 102 of the RCA 1994;

(d) the subject matter of the main claim by the plaintiff was for stoppage of overriding commissions for 44 months which amounting to RM364,787.72;

(e) the plaintiff also claiming for the RGB in the amount of RM259,409.06; and

(f) the plaintiff's claim also included a prayer for a declaration that the stoppage of payments of the overriding commissions and the withholding of the RGB were illegal, null and void and damages to be assessed.

DECISION

[30] Section 68(1)(a) of the CJA 1964 clearly provide that leave must be obtained if value of the subject matter is less than RM250,000. Section 68(1)(a) was in the following:

> 68 Non-appealable matters
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> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
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> (a) When the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal;

[31] The defendant application to struck out the plaintiff's appeal by way of PO on the ground that the appeal was incompetent was made pursuant to O 33 r 2 of the Rules of Court 2012 ('the ROC 2012') which provides:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[32] On the defendant's counsel complaint that wrong procedure adopted by the plaintiff instead of by way of motion under r 48 of the RCA 1994, we disagree with the submission. The plaintiff's application for the PO was premised on O 33 r 2 of the ROC 2012. Whereas, r 48 of the RCA 1994 was confined to any application authorise to be made under the RCA 1994. Rule 48 stated:

> 48 Where by these Rules any application is authorized to be made to the Court or a Judge, such application, if made to a judge in Court, shall be made by motion.

[33] Learned counsel for the defendant in his submission also relied on rr 3A and 102 of the RCA 1994, which provides:

> 3A Preliminary objection on the ground of non-compliance shall not be allowed

A Court of Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court of Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

102 Non-compliant with Rules not to render proceedings void

Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.

[34] We are of the view that if we allowed the plaintiff's appeal to proceed on its merits, that will caused a substantial miscarriage of justice as it will blatantly disregard the provision of the law as envisaged by s 68(1)(a) of the CJA 1964. Thus, it will prejudice the defendant. As to r 102, clearly states for any non-compliance with any provision under the RCA 1994, which is not the case here. What happened in the appeal before us was a non-compliance to the mandatory provision under the CJA 1964. Learned counsel for the plaintiff's submission on this issue was not tenable.

[35] We observed from the plaintiff's amended statement of claim that subject matter of claim had been quantified and adjudged by the learned High Court judge as totalling RM234,940.28, the amount of the mistaken payments to the plaintiff. Besides, the plaintiff was also asking for a declaratory relief and damages to be assessed. The plaintiff's own pleadings never quantified the amount of damages.

[36] We are of the view that damages to be asses as prayed for by the plaintiff cannot be factored into the value of the claim because damages are consequential and not the subject matter of the claim. Our view further fortified by this court earlier decision in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 1 MLJ 129 which decision was affirmed by the Federal Court, where it was decided that:

It is quite clear to us that the declarations as described above are those that relate to subject matters which either do not have any value attached to them or its value cannot be quantified. In the case before us, the subject-matter was the sale and purchase agreement with a contract price relating to the sale price of the 26 pieces of land.

Learned counsel for the applicant/appellant also urged us that the damages prayed for in prayer (vi) in the statement of claim should be added to the value of the subject matter so that the total value would be unknown thus it would pass the test laid down in s 68(1)(a) of the Act and therefore leave would not be required. We, however, were unable to accept such a proposition for the reason that s 68(1)(a) of the Act clearly specifies that the 'value' that is required to be quantified must be the

'value' of the subject-matter 'of the claim'. The damages as prayed in prayer (vi) are only consequential. They are not the 'subject matter of the claim'. A

In his final submission, the learned counsel for the applicant/appellant asked the court that he be allowed to file a motion for leave. We thought it was too late in the day for the request to be entertained. The said Practice Direction was issued in 1996, while the present applications were filed two years later. To interpret item (ii) of the said Practice Direction against s 68(1)(a) of the Act is not a difficult task. The case of *Amer Mohideen Dawood v Sneh Bhar w/o Ter Binder Singh* [1996] 2 MJ 329 was cited to us in support of the proposition that an appeal the subject matter of which comes within the terms of s 68(1)(a) of the Act where the value is less than RM250,000 is incompetent. The Court of Appeal in this case decided as to the meaning of the words 'the amount of the claim' or 'the value of the subject matter of the claim' as found in s 68(1)(a) of the Act. It decided that the 'amount' or 'value' must be 'the total amount of the claim in the action which has been adjudged to be payable' or the value of the subject matter of the claim 'in the action which has been adjudged as recoverable because it is against the judgment (and not against the claim made by the claimants in the pleadings)'. That case was decided on 6 April 1996 which was before the issuance of the said practice direction. (They were issue on 27 June 1996). In the present case, the whole action had been disposed of. The purchase price of the land was S$52,000 which was below RM250,000) as in the agreement. Even if the 26 issue documents of title were to be taken as the subject-matter of the claim, they must still be considered as having value because they relate to those 26 pieces of land as referred to in the sale and purchase agreement which stipulated the total price. In the *Amer Mohideen Dawood*'s case, the value of the subject matter of the order for specific performance of the sale and purchase agreement of 14 September 1989 was the purchase price of the land which was RM99,000. Being below RM250,000, the court ruled that the appeal was therefore incompetent as no leave to appeal was obtained from the Court of Appeal. In the case before us it was the matter of declaration that added another facet to the case. Once the 'subject matter of the claim' has been identified and its value determined, the question of declaration becomes a non-issue. B C D E F

[37] In *Amer Mohideen Dawood v Sneh Bhar w/o Ter Binder Singh* [1996] 2 MLJ 329 this court on similar issue decided that: G

'The amount of the claim' has to mean the total amount or sum of the claim in the action which has been adjudged to the payable, and if it is not a money claim, it is 'the value of the subject-matter of the claim' in the action which has been adjudged as recoverable, because it is only against the judgment (and not against the claim made by claimants in their pleadings) that the appeal could be brought. See *Allan v Pratt* (1888) 13 AC 780. The Earl of Selborne, Lord Watson, Lord Hobhouse and Sir Barnes Peacock), said this, at pp 781–782: H

> Their Lordships are of opinion that the appeal is incompetent. The proper measure of value for determining the question of the right of appeal is, in their judgment, the amount which has been recovered by the plaintiff in the action and against which the appeal could be brought. Their Lordships, even if they were not bound by it, would agree in principle with the rule laid down in the judgment of this tribunal delivered by Lord Chelmsford in the case of I

> *Macfarlane v Leclaire* 15 Moore PCC 181, that is, that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal. If there is to be a limit of value at all, that seems evidently the right principle on which to measure it. The person against whom the judgment is passed has either lost what he demanded as plaintiff or has been adjudged to pay something or to do something as defendant. It may be that the value to the defendant of an adverse judgment is greater than the value laid by the plaintiff in his claim. If so, which was the case in *Macfarlane v Leclaire*, it would be very unjust that he should be bound, not by the value to himself but by the value originally assigned to the subject-matter of the action by his opponent. The present is the converse case. A man makes a claim for much larger damages than he is likely to recover. The injury to the defendant, if he is wrongly adjudged to pay damages, is measured by the amount of damages which he is adjudged to pay. That is not in the least enhanced to him by the fact that some greater sum had been claimed on the other side.
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> Therefore in principle Their Lordships think the case is governed by *Macfarlane v Leclaire*, upon the question of value, and they do not think it is at all affected by the circumstance that the court below did not give effect to that objection, but gave leave to appeal. It has been decided in former cases that leave so given does not make the thing right, if it ought not to have been done.

The appellant (who was the defendant in the High Court) as 'the person against whom the judgment is passed ... has been adjudged ... to do something as defendant', namely, he was ordered specifically to perform the sale and purchase agreement dated 14 September 1989. An appeal against that judgment will be prohibited if the value of the subject-matter of the judgment for specific performance is below the value of RM250,000 (if leave to appeal to the Court of Appeal has not been obtained).

If 'the amount of the claim' or 'the value of the subject-matter of the claim' is to be based on the claim as pleaded in the statement of claim and not in the judgment, then the purpose of s 68(1)(a) of the Act could be circumvented quite easily by claimants merely stating in their pleadings, in every case, that they are claiming for more than RM250,000. This easy way to get round the need to obtain leave makes the entire provision of s 68(1)(a) of the Act superfluous. This is how it was put by Mahadev Shankar JCA in *Monohary Teresa v Tan Ah Lek* [1995] 3 MLJ 365, at p 368.

> Such an approach ... could side-track the purpose of s 68(1)(a) because claimants could get round the need to obtain leave merely by stipulating in their pleadings that they are claiming for more than RM250,000 in every case.

[38] Tengku Baharudin Shah JCA (as he then was) in *Harcharan Singh s/o Sohan Singh v Ranjit Kaur d/o S Gean Singh (sued as the administratrix of the estate of Bhagwan Singh s/o Sohan Singh, deceased)* [2010] 2 MLJ 479 clearly stated:

> [16] As to whether leave was required in the case of claim for specific relief, as in this case for a declaration, s 68(1)(a) of the CJA makes no exception for such a case. The

said provision is clear and unambiguous — see *Mohd Tahir b Mohd Sheriff v Ramlah bt Abdullah* [2004] 6 AMR 165 at p 167. In *Amer Mohiden Dawood v Sneh Bhar w/o Ter Binder Singh*, the High Court ordered specific performance of a contract for sale of land against the appellant. His appeal was challenged for being incompetent for failure to obtain leave although the value of the subject matter was less from RM250,000. The appeal was dismissed by this court for being incompetent as the value of the subject matter of the order of specific performance was the purchase price of the land which was RM99,000 and no leave was obtained from the Court of Appeal. Our case is no different except the relief sought was for a declaration.

[17] To alleviate the then prevailing uncertainties faced by legal practitioners, a guideline in the form of the Court of Appeal Practice Direction No 2 of 1996 was issued by then President of this court. It listed our instances when prior consent of this court was not necessary before notice of appeal may be filed 'in cases connected with a specific amount or value'. Item (ii) of the said guideline reads:

> (ii) Declarations — to declare that the giving of a licence, an act, an omission or decision of a body or person empowered by law is invalid and annulled.

[18] The declaration sought by the appellant in our case do not, by any stretch of the imagination come within the context listed. In any event, learned President of the Court of Appeal who issued the said guideline himself when presiding over a panel of this court was faced with a similar issue in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd*. It was held that item (ii) of the said Practice Direction applies only to declarations respecting subject matters that have no value attached to them or those with values that cannot be quantified. Likewise in our case, the subject matter of the claim had been identified and its value determined, hence the question of declaration became a non-issue. Failure to obtain leave of this court to appeal was thus fatal.

CONCLUSION

[39] For the reasons given, we accordingly upheld the preliminary objection raised by the defendant. The appeal by the plaintiff was incompetent due to the failure to obtain leave of this court to appeal which was fatal. The plaintiff's appeal was dismissed with costs without considering the merits.

Appeal dismissed unanimously without considering the merits.

Reported by Ashok Kumar